UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of:	)	Docket No. UIC AO-NAV99-01
	)	
APA Development, Inc.	)	
	)	
RESPONDENT	)	
	)	

DEFAULT ORDER AND INITIAL DECISION

By Motion for Default Judgment filed October 22, 1999, Complainant, the Acting Director of the Water Management Division, United States Environmental Protection Agency, Region 9, moved for a default judgment against Respondent, APA Development, Inc. for liability under the Safe Drinking Water Act, 42 U.S.C. Section 300h, in the full amount of the penalty in the Proposed Administrative Order dated October 19, 1998, fifteen thousand three hundred forty-four dollars ($15,344.00)

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties at 40 C.F.R. Part 22, 64 Federal Register 40138 (July 23, 1999) and based upon the record in this matter and the following Findings of Fact, Conclusions of Law, and Determination of Penalty, Complainant's Motion for Default Judgment is hereby GRANTED. The Respondent, APA Development, Inc., is hereby found in default and a civil penalty is assessed in the amount of $15,344.00.

I. INTRODUCTION

This civil administrative penalty proceeding arises under Section 1423(c) of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. Section 300h-2(c). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules") at 40 C.F.R. Part 22, Subpart I, 64 Federal Register 40138 (July 23, 1999).[1]

On October 26, 1998, Complainant served the Proposed Administrative Order With Administrative Civil Penalty (the Proposed Administrative Order) on the Respondent by certified mail. **The Proposed Administrative Order alleged that Respondent had violated the Safe Drinking Water Act and the Underground Injection Control ("UIC") regulations promulgated under the Act, sought compliance with the UIC regulations issued under the Act, and sought an administrative penalty of $15,344.00.** The Respondent's answer, dated November 24, 1998, was filed December 2, 1998.

Because the Respondent failed to comply with the Presiding Officer's Scheduling Order requiring it to submit a prehearing exchange, and for the related reasons discussed below, the

[1] The proceeding was initally governed by proposed Subpart I regulations issued at 63 Federal Register 9480 (February 25, 1998).

Respondent is found to be in default pursuant to Section 22.17(a) of the Consolidated Rules. Default by the Respondent constitutes an admission of all facts alleged in the proposed administrative order, and a waiver of the Respondent's right to a hearing to contest those factual allegations. Consolidated Rules, Section 22.17(a). The factual allegations contained in the proposed administrative order, deemed to be admitted, establish that the Respondent violated Section 1423(c) of the Safe Drinking Water Act and related regulations. Taking into consideration the statutory factors, a penalty in the amount sought in the Proposed Administrative Order, $15,344.00 is appropriate.

II. FINDINGS OF FACT

Pursuant to 40 C.F.R. §22.17 and the entire record in this matter, I make the following findings of fact:

1. On October 26, 1998, Complainant served the Proposed Administrative Order With Administrative Civil Penalty (the Proposed Administrative Order) on the Respondent by certified mail. Public notice of the Proposed Order was given in the Daily Times, Farmington, N.M. on November 1, 1998. The Proposed Administrative Order alleged that Respondent had violated the SDWA and the UIC regulations promulgated under section 1422 of the SDWA at 40 C.F.R. § 124, 144, 145, 146, 147 and 148, sought compliance with the UIC regulations issued under the Safe

Drinking Water Act, and sought an administrative penalty of $15,344.00. The Respondent's answer, dated November 24, 1998, was filed December 2, 1998.[2]

2. Based on the allegations of the Proposed Administrative Order, paragraphs 1 through 19:

(1) APA DEVELOPMENT, INC. ("Respondent") is a corporation authorized to do business in the State of New Mexico with the principal place of business in Phoenix, Arizona. Respondent is a "person" within the meaning of Section 1401(12) of the SDWA, 42 U.S.C. §300f-12.

(2) The Respondent operates six (6) injection wells, which are Class II injection wells as defined by 40 C.F.R. §§144.3, 144.6(b), 146.3, and 146.5(b). These wells are the subject of the Proposed Administrative Order. These wells are located within San Juan County, New Mexico on the Navajo Nation. The names and locations of the wells are listed in ATTACHMENT A to the Proposed Administrative Order which is hereby incorporated by reference.

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[2] The Proposed Administrative Order was apparently not filed with the Hearing Clerk at the time it was served. On December 23, 1998 the attorney for the Complainant advised the Respondent that the Proposed Administrative Order was being filed with the Hearing Clerk on December 23, 1998 and that consequently the Respondent would have an additional 30 days to file an answer or request a hearing. The Respondent was also advised "[i]f you do not file a new answer within thirty days, your answer, filed on December 2, 1998, will be deemed an answer to the enclosed Proposed Administrative Order." The Respondent did not file a new answer.

(3) Pursuant to Section 1422(e) of the SDWA, 42 U.S.C. §300h-1, and 40 C.F.R. §147 Subpart GG Section 147.1603, EPA administers the Underground Injection Control ("UIC") program on Indian lands in the state of New Mexico. Said UIC program consists of the program requirements of 40 C.F.R. §§124, 144, 146, 147, and 148. The effective date of this program is November 25, 1988.

(4) Pursuant to 40 C.F.R. §144.22, Respondent is authorized by rule to operate the six (6) injection wells listed in ATTACHMENT A to the Proposed Administrative Order. Respondent is subject to all terms and conditions necessary to maintain this authorization.

(5) Pursuant to 40 C.F.R. §144.28(c), the owner or operator is required to prepare, maintain and comply with a plan for plugging and abandoning the well or project that meets the requirements of §146.10 and is acceptable to the Director.[3] The owner shall submit any proposed plan, on a form provided by the Regional Administrator, no later than 1 year after the effective date of the UIC Program in the state.

(6) Pursuant to 40 C.F.R. §144.28(d), the owner or operator is required to maintain financial responsibility and resources to close, plug and abandon the underground injection operation in a manner prescribed by the Director. The owner or operator shall

[3] The Director of the Water Division, EPA Region 9.

show evidence of such financial responsibility to the Director by the submission of a surety bond, or other adequate assurance, such as a financial statement.

(7) Pursuant to 40 C.F.R. §144.28(l), the owner or operator is required to notify the Director "of a transfer of ownership or operational control of the well at least 30 days in advance of the proposed transfer."

(8) Pursuant to 40 C.F.R. §144.28(h)(2), the owner or operator is required to submit an annual report to the Director summarizing the results of all monitoring, as required in 40 C.F.R. §144.28(g)(2). The annual report is to include summaries of monthly records of injected fluids, and any major changes in characteristics or sources of injected fluids.

(9) Pursuant to 40 C.F.R. §144.22(c), an owner or operator of a well authorized by rule is prohibited from injecting into the well upon failure to submit a permit application in a timely manner pursuant to 40 C.F.R. §§144.25; upon failure to comply with a request for information in a timely manner pursuant to 40 C.F.R. §144.27; and upon failure to provide alternative financial assurance pursuant to 40 C.F.R. §144.28(d).

(10) On June 12, 1997, EPA sent Respondent a letter pursuant to 40 C.F.R. §144.27 outlining violations in compliance with requirements regarding mechanical integrity tests (MITs), financial resources to plug and abandon the subject wells, and

annual operating reports. Respondent was required to remedy the outlined violations within 30 days of receipt of the letter.

(11) Respondent sent a letter to EPA (no date) in response. However, the letter did not address the concerns outlined in EPA's June 12, 1997 letter.

(12) Specifically, Respondent failed to schedule MITs for the six (6) wells listed in ATTACHMENT A to the Proposed Administrative Order, in violation of 40 C.F.R. §144.28(f)(2).

(13) Respondent failed to submit evidence of financial responsibility for costs of plugging and abandoning the six (6) wells listed in ATTACHMENT A to the Proposed Administrative Order, in violation of 40 C.F.R. §144.28(d)(1) and (2).

(14) Respondent failed to submit the plugging and abandonment plan for the six (6) wells listed in ATTACHMENT A to the Proposed Administrative Order, in violation of 40 C.F.R. §144.28(c)(1), (2), (i), (ii), and (iii).

(15) Respondent failed to submit the required annual operating reports in violation of 40 C.F.R. §144.28(h)(2).

(16) On December 12, 1997, EPA sent Respondent a letter pursuant to 40 C.F.R. §144.25 outlining the reasons for requiring the submission of an application for area permit to operate the six (6) injection wells. Respondent was required to apply for a permit within 45 days of receipt of the letter.

(17) Respondent failed to submit the required application

for area permit, in violation of 40 C.F.R. §144.25.

(18) Respondent failed to submit change of ownership information; a written agreement between the transferor and the transferee containing a specific date for transfer of ownership or operational control of the well; and a specific date when the financial responsibility demonstration of 40 C.F.R. §144.28(d) will be met by the transferee, in violation of 40 C.F.R. §144.28(l).

(19) The violations outlined above are subject to enforcement action under Section 1423 of the SDWA, 42 U.S.C. §300h-2. This section provides for civil and/or criminal enforcement actions in court or the issuance of administrative orders that mandate compliance with provisions of the SDWA and/or assess administrative penalties for violations.

3. Section 1423(c) of the SDWA, 42 U.S.C. §300h-2(c), authorizes the assessment of a civil penalty of up to $125,000 for violations of the Safe Drinking Water Act.[4] The proposed civil penalty in the Complaint is for $15,344.

4. Pursuant to SDWA Section 1423(c), 42 U.S.C. §§ 300h-2(c), the factors considered by EPA in determining the amount of

[4] Violations involving Class II wells are subject to a civil penalty of not more than $5000 per day for each day of violation, up to a maximum of $125,000. 42 U.S.C. Section 300h-2(c)(2). Penalties have been increased to $5,500 per day of violation, up to a maximum of $137,000, for any violations which occur after January 30, 1997. See 40 C.F.R. Part 19.

the proposed penalty include (1) the seriousness of the violation; (2) the economic benefit (if any) resulting from the violation; (3) any history of such violations; (4) any good-faith efforts to comply with the applicable requirements; (5) the economic impact of the penalty on the violator; and (6) such other matters as justice may require.

5. Respondent failed to appear at prehearing conferences scheduled July 29, 1999 and September 29, 1999; failed to comply with the information exchange requirements of Section 22.19(a) of the Consolidated Rules by failing to file the prehearing exchange due October 14, 1999; and failed to comply with the Presiding Officer's Scheduling Order dated September 2, 1999.

6. On October 22, 1999 Complainant filed a Motion for Default Judgment. Complainant attempted to serve the Motion on the Respondent by certified mail on October 26, 1999, but the envelope was returned to EPA by the post office marked "unclaimed." On December 20, 1999 the Complainant sent a second copy of the Motion for Default Judgment to the Respondent by regular first class mail. Respondent had fifteen days from the date of service to respond, 40 C.F.R. 22.16(b), plus five additional days because the Motion was served by mail. 40 C.F.R. 22.7(c).

7. On November 23, 1999, the Presiding Officer issued an Order to Show Cause, ordering the Respondent "to show cause why

it should not be found in default for failure to file its prehearing exchange and for the other grounds alleged in the Complainant's Motion for Default Judgment filed October 22, 1999." The Order to Show Cause stated that "[t]he Respondent may file a written response to this Order no later than Friday, December 17, 1999."

8. As of the date of this Default Order and Initial Decision, Respondent has failed to file its prehearing exchange, has failed to respond to the Motion for Default Judgment, has failed to file a written response to the Order to Show Cause, and has failed to show cause why it should not be found in default.

III. CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. § 22.17(c), and based on the entire record in this matter, I make the following conclusions of law:

1. The Consolidated Rules provide that an order of default may be issued "after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a).

2. Respondent's failure to appear at two prehearing conferences, failure to comply with the information exchange requirements of Section 22.19(a) of the Consolidated Rules, and failure to comply with the Presiding Officer's Scheduling Orders constitute grounds for issuing the present order finding the Respondent in default.

3. Respondent's default constitutes an admission of all facts alleged in the Proposed Administrative Order, as described in the Findings of Fact above.

4. Respondent is a "person" within the meaning of Section 1401(12) of the SDWA, 42 U.S.C. § 300f-12.

5. By reason of the facts found as set out in the Findings of Fact above, the Respondent violated Section 1423 of the SDWA, 42 U.S.C. § 300h-2

6. The civil penalty in the Proposed Administrative Order, $15,344, is authorized and the amount of the penalty is in accordance with the statutory penalty criteria in Section 1423 of the SDWA, 42 U.S.C. §300h-2.

7. When the Presiding Officer finds that a default has occurred, he shall issue a Default Order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the Initial Decision. 40 C.F.R.

§22.17(c). The present Default Order resolves all outstanding issues and claims in this proceeding.

IV. DISCUSSION

The primary issue for decision is whether the Respondent should be found in default for failure to appear at two prehearing conferences, failure to comply with the information exchange requirements of section 22.19(a), and failure to comply with the scheduling orders issued by the Presiding Officer.

A review of the procedural history of this case demonstrates the Respondent's repeated failure to comply with the procedural requirements of the Consolidated Rules and failure to comply with orders issued by the Presiding Officer:

(1) According to the certificate of service, the Proposed Administrative Order dated October 19, 1998 was served on the Respondent by certified mail, addressed to

Mr. Jeff Einhart[5]
APA Development, Inc.
1250 E. Missouri
Phoenix, AZ 85014

The Respondent's Answer was sent to EPA with a cover letter signed by Mr. Einardt in which Mr. Einardt stated that he "had to

[5]Mr. Einardt's name was spelled incorrectly in this and several subsequent documents issued by EPA. In addition, while the Answer spells the Respondent's name as "A.P.A. Development, Inc." other documents in the Record spell the Respondent's name as shown in the certificate of service, without periods after the three initial letters.

take over ownership" of the Respondent from the prior owner "to save my investment." The cover letter was dated November 24, 1998 and was filed December 2, 1998.

(2) On March 4, 1999, the Regional Judicial Officer issued a "Notice and Order' scheduling a prehearing conference. The order was served by regular first class mail, addressed as shown above for the Proposed Administrative Order. The Notice and Order was returned by the Post Office, marked "RETURN TO SENDER/NO FORWARD ORDER ON FILE/UNABLE TO FORWARD." The attorney for the Complainant was able to contact the Respondent to advise it of the prehearing conference. During the prehearing conference on March 18, 1999, Mr. Einardt provided a new mailing address for the Respondent, a post office box in Phoenix, Arizona, and also provided a temporary telephone number at which he could be reached.

(3) A second prehearing telephone conference was held on June 22, 1999,[6] at which the parties agreed to schedule the hearing in this matter on October 13, 1999, the prehearing information exchange on September 13, 1999, and a third prehearing conference at 10:00 a.m. on July 29, 1999.

(4) On July 29, 1999, after requesting that the 10:00 a.m. prehearing conference be rescheduled to 11:30, the Respondent failed to appear for the prehearing telephone conference.

(5) On August 23, 1999, the Presiding Officer issued a

[6]The conference was rescheduled from May 18, 1999 at the Complainant's request.

notice and order setting a new prehearing telephone conference for September 2, 1999, at 11:00 a.m. On August 23rd, the Presiding Officer also sent a letter to Mr. Einardt and APA Development, Inc. reminding the Respondent of the consequences for failure to appear at a prehearing conference. Specifically, the letter stated

> [p]lease bear in mind that under 40 C.F.R. § 17(a) of the Consolidated Rules of Practice, you may be found in default if you fail to comply with the order scheduling the prehearing conference call or if you fail to appear at a conference or hearing.

The letter also informed Respondent that "[a]ny failure by you to comply with the information exchange requirements of Section 22.19 may also result in a finding of default against you."

(6) On September 2, 1999, Mr. Einardt was not ready for the telephone conference call at 11:00 a.m. The conference was rescheduled to 11:30 a.m. at his request and held as rescheduled.

(7) On September 2, 1999, the Presiding Officer issued a Scheduling Order which set a prehearing conference for September 29, 1999, rescheduled the prehearing exchange for October 13, 1999, and rescheduled the hearing for November 16, 1999. The Presiding Officer again reminded Respondent that

> [f]ailure to comply with the prehearing exchange requirement may result in the party being found in default. 40 C.F.R. § 22.17(a). Failure to list witnesses or submit documents or exhibits as part of the information exchange may result in exclusion of those witnesses from testifying or the documents or exhibits not being admitted into evidence. 40 C.F.R. § § 22.19(a) and 22.22(a).

(8) Despite this warning, Respondent failed to appear at the prehearing conference scheduled for September 29, 1999. In

addition, Respondent failed to file the prehearing exchange due October 14, 1999,[7] or to submit a statement, as required by the Prehearing Order, that Respondent did not intend to call any witnesses or introduce any exhibits at hearing.

(9) On October 22, 1999 the Complainant filed the Motion for Default Judgment under consideration here. The Motion was served on the Respondent by certified mail at the post office box stated above. On October 28, 1999, the Presiding Officer cancelled the November 10, 1999 prehearing conference and the November 16, 1999 hearing in order to allow sufficient time to consider the Motion for Default.

(10) On November 23, 1999 the Respondent was ordered to show cause "why it should not be found in default for failure to file its prehearing exchange and for the other grounds alleged in the Complainant's motion for Default Judgment" and was advised that it "may file a written response to this order no later than Friday, December 17, 1999."

(11) On December 3, 1999, the attorney for the Complainant advised the Presiding Officer by letter that the copy of the Motion for Default Judgment sent certified mail to the Respondent had been returned by the Post Office marked "Unclaimed."

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[7] On October 13, 1999, EPA Region IX filed a motion for a one-day extension of time to file the prehearing exchange, making it ultimately due October 14, 1999. The attorney for the Complainant called Mr. Einardt on October 13, 1999, to inform him that prehearing exchange material was now due on October 14, 1999. During that phone conversation, counsel reminded Mr. Einardt of the Respondent's obligation to submit prehearing exchange material.

(12) On December 9, 1999 Mr. Einardt left a voicemail message for the Presiding Officer stating that he had filed personally for Chapter 13 bankruptcy and that he would send the Order to Show Cause to his attorney. No further response has been received from Respondent as of the date of this Initial Decision.

(13) The Presiding Officer forwarded the voicemail message to the attorney for the Complainant with a request that the attorney attempt to contact Mr. Einardt. The attorney advised by letter dated December 20, 1999 that she had left a telephone message for Mr. Einardt but had not received a response, and that a second copy of the Motion for Default Judgment had been sent to the Respondent by regular first class mail at the most recent address she had for the Respondent, the post office box above.

Thus, although the Respondent was given ample warning of the consequences of doing so, it failed to comply with orders issued by the Presiding Officer, repeatedly failed to participate in scheduled prehearing conferences, and failed to file its prehearing exchange.

As noted by the Complainant in its Motion for Default Judgment, Respondent's pro se status does not excuse such inaction. See In re Rybond, Inc., 1996 EPA App. LEXIS 16; 6 E.A.D. 614, 647 (EAB November 8, 1996), in which the Environmental Appeals Board noted:

> It is true that both the federal courts and the Agency have adopted the approach that 'more lenient standards of competence and compliance apply to pro se litigants.'

> Nonetheless, a litigant who elects to appear pro se takes upon himself or herself the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance

(internal citations and quotations omitted). See also, Jiffy Builders, Inc., 1999 EPA App LEXIS 15 at *11, *14 (E.A.B. May 25, 1999)(noting that "on many occasions, [the Environmental Appeals Board has] affirmed the issuance of default orders for failure to comply with a prehearing order" and rejecting the position that such a default order should be overturned because respondent was proceeding pro se); George Atkinson, 1998 EPA ALJ LEXIS 122 (ALJ October 26, 1998) (issuing default order against pro se respondent based on failure to file prehearing exchange as ordered); and In the Matter of Mountain States Asbestos Removal, Inc., 1997 EPA ALJ LEXIS 112 (ALJ May 1, 1997) (issuing default order on the basis of Respondent's failure to comply with Prehearing Order).

In addition, the record shows that the Respondent received repeated notice that it might be found in default as the result of its failure to comply with orders issued by the Presiding Officer and failure to meet the requirements of the Consolidated Rules. Although the Respondent refused service by certified mail of the Complainant's Motion for Default,[8] the subsequent service

[8] As to the effect of the Respondent's refusal to accept service of a motion mailed to it by the Complainant, compare Mountain States Asbestos Removal, Inc., Docket No. CAA-II-94-0106 at page 7 (ALJ, May 1, 1997) ("I note that a respondent cannot avoid the entry of an order against him . . . simply by making his whereabouts unknown after jurisdiction over him has been acquired in the proceeding").

by regular first class mail constitutes proper service under Section 22.5(b)(2) of the Consolidated Rules. Even if the Motion for Default had not been served a second time by regular first class mail, it should be noted that under Section 22.17(a) the Respondent could be found in default by the Presiding Officer sua sponte, without a motion by the Complainant. Consequently, the Complainant's motion for default is not a necessary procedural preconditions to finding the Respondent in default.

In any event, the Respondent was also served with the Presiding Officer's Order to Show Cause, which also put Respondent on notice that it might be found in default. The Respondent acknowledged receipt of the Order to Show Cause in Mr. Einardt's December 9, 1999, voicemail message to the Presiding Officer, but to date has not complied with the Order to Show Cause or with the prehearing exchange requirements of the Scheduling Order. Section 22.17(a) provides, in pertinent part, that "[a] party may be found to be in default... upon failure to comply with . . . an order of the Presiding Officer." The Respondent's failure to comply with those orders subjects the Respondent to a default order under Section 22.17(a) of the Consolidated Rules.

Although this language of Section 22.17(a) concerning the entry of a default order appears discretionary in nature,

> . . . the regulation should be applied as a general rule in order to effectuate its intent. In other words, when the facts support a finding that there has been a failure to comply with a prehearing order or hearing order without good cause, a default order generally should follow. Such

> position is consistent with the regulation's later mandatory provision that "[d]efault by the complainant shall result in the dismissal of the complaint with prejudice."(7)40 C.F.R. § 22.17(a). It is also noted that the entry of a default order avoids indefinitely prolonged litigation.

Bio-Scientific Specialty Products, Inc., I.F.&R. Docket No. II-557-C, 1999 EPA ALJ at 7 (AlJ, August 19, 1999).

Given Respondent's repeated failure to comply with orders issued by the Presiding Officer and to meet the prehearing exchange requirements of the Consolidated Rules, an order for default judgment should be entered against the Respondent.

V. DETERMINATION OF PENALTY

Under the Consolidated Rules, the Presiding Officer shall determine the amount of the civil penalty

> based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act . . . . If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing exchange, or the motion for default, whichever is less.

40 C.F.R. § 22.27(b).

In the Proposed Administrative Order and the Motion for Default Judgment, Complainant requested a penalty of $15,344.00. The Prehearing Order dated September 1, 1999 required Complainant to provide an explanation of how the proposed penalty of $15,344 was calculated. On October 14, 1999, Complainant filed, as part of its prehearing exchange, an explanation of the penalty

calculation. Complainant's Memorandum in Support of Complainant's Motion for Default Judgment supplemented the explanation in the prehearing exchange.

As explained in those documents, Complainant used the "Interim Final UIC Program Judicial and Administrative Settlement Policy" ("Settlement Policy") to determine the proposed penalty in this case. The Settlement Policy is based on the factors listed in section 1423(c)(4)(B) of the SDWA and splits calculation of the penalty into two components, gravity and economic benefit. The $15,344 proposed penalty is the total of three separate calculations for the different sets of violations alleged in the complaint: 1) $3,376 for failure to submit the required permit application; 2) $7,276 for failure to file required annual reports; and 3) $4,692 for failure to submit required mechanical integrity tests, sufficient financial assurances and notice of change of ownership.

The Complainant does not explain why it used a settlement policy to calculate the amount of the penalty sought in the Proposed Administrative Order. Since the policy is intended to provide guidance to EPA staff as to the minimum penalty for which the Agency would be willing to settle a case, see Settlement Policy at page 2, it appears inappropriate to use the policy to calculate the penalty to be proposed at the initiation of an administrative proceeding. Compare C.E. McClurkin dba J-C Oil Company, Docket No. VI-UIC-98-001 (February 10, 2000), 2000 EPA RJO at pp. 18-19, with J. Magness, Inc., Docket No. UIC-VIII-94-

03 (October 28, 1996), 1996 EPA RJO at p. 22. However, because the Respondent is in default, Section 22.27(b) of the Consolidated Rules precludes the assessment of a penalty greater than that sought by the Complainant. Since, as discussed below, a penalty of at least $15,344.00 is justified under the penalty criteria in the SDWA, I adopt the Complainant's penalty analysis and find that a penalty of $15,344.00 is appropriate in this case.

Section 22.27(b) of the Consolidated Rules requires that an Initial Decision include an explanation how the penalty to be assessed corresponds to any penalty criteria in the Act. The penalty criteria in Section 1423(c) of the Safe Drinking Water Act, 42 U.S.C. §§ 300h-2(c), are: (1) the seriousness of the violation; (2) the economic benefit (if any) resulting from the violation; (3) any history of such violations; (4) any good-faith efforts to comply with the applicable requirements; (5) the economic impact of the penalty on the violator; and (6) such other matters as justice may require.

The penalty to be assessed corresponds to these factors as follows:

(1) the seriousness of the violation. The Complainant considered failure to submit a required permit application, failure to perform required mechanical integrity tests, and failure to submit sufficient financial assurances as Level II or "moderate" infractions under the Penalty Policy, and considered

failure to file annual reports and failure to submit a notice of change of ownership as Level III, or "less severe" infractions. I find that, on the facts the present case, failure to file annual reports and failure to perform required mechanical integrity tests are more serious violations than recognized by the Complainant. The Respondent's repeated failure to file annual reports deprives cognizant regulatory agencies of information needed to effectively administer programs to protect underground sources of drinking water. Similarly, regular mechanical integrity testing, including testing of wells not currently in operation, is essential in order to assure that the wells are not leaking.

(2) the economic benefit (if any) resulting from the violation. The Complainant has explained in detail its estimate of the economic benefit that has accrued to the Complainant from the violations charged in the Proposed Administrative Order. I agree with and adopt the Complainant's calculations as set forth in the Complainant's Prehearing Exchange and Complainant's Motion for Default Judgment.

(3) any history of such violations. The record does not show any prior violations by the Respondent.

(4) any good-faith efforts to comply with the applicable requirements. Although the Respondent has expressed a general intention to comply with the requirements of the Safe Drinking

Water Act and the UIC program, as of the date of this Initial Decision the Respondent has not corrected the violations alleged in the Proposed Administrative Order.

(5) the economic impact of the penalty on the violator.

Respondent, in its answer, generally contested the amount of the penalty. As stated in its prehearing exchange, Complainant took account of the possible economic impact of the penalty on the Respondent by including a multiplier of 0.3 when calculating the gravity component of the penalty. That is, the gravity component of the penalty was reduced by seventy percent in consideration of the Respondent's apparent small size.[9] This adjustment appears adequate to take into account the size of Respondent's business and its possibly limited financial resources. In addition, the adjustment appears adequate to take into account, to the extent it may be necessary to do so, the general, unsubstantiated, statements by the Respondent's owner that he is experiencing personal financial difficulties.

Although explicitly ordered to do so, the Respondent has not submitted any information that would justify any additional downward adjustment of the penalty. Respondent was ordered, as part of the prehearing exchange required by the September 2, 1999 Scheduling Order, to provide "an explanation of why the proposed penalty of $15,344.00 should be mitigated or eliminated." As stated above, Respondent failed to file the required prehearing

[9]According to Complainant, Respondent is not listed in Dun and Bradstreet.

exchange.

(6) such other matters as justice may require. The record in this proceeding does not reveal any other matters that would serve as a basis for reducing or eliminating the penalty. Accordingly, no basis has been shown for mitigating the proposed penalty beyond the reductions already made by the Complainant in its penalty calculation, and the full penalty in the Proposed Administrative Order, $15,344.00, will be assessed against the Respondent.

VI. DEFAULT ORDER

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. §22.17, Complainant's Motion for Default Judgment is hereby GRANTED, and Respondent is hereby ORDERED to comply with all of the terms of this Order:

A. Respondent is hereby assessed a civil penalty in the amount of fifteen thousand three hundred forty-four dollars ($15,344.00) and ordered to pay the civil penalty as directed in this order.

1. Respondent shall pay the civil penalty by certified or cashier's check payable to the Treasurer of the United States within thirty (30) days after the effective date of this order. The check shall be sent by certified mail, return receipt requested, to:

U.S. Environmental Protection Agency
Region 9
Regional Hearing Clerk

P.O. Box 360863M
Pittsburgh, PA 15251

Respondent shall state the docket number of this Default Order and Initial Decision on the face of the check.

2. At the time payment is made to the above address, Respondent shall send a photocopy of the check by first class mail to each of the following addresses:

Regional Hearing Clerk
U.S. EPA, Region 9 (Mail Code RC-1)
75 Hawthorne Street
San Francisco, CA 94105

Elizabeth LaBlanc, (ORC-3)
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

George Robin, (WTR-9)
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

3. In the event of failure by Respondent to make payment within thirty days after the date this Order becomes effective, the matter may be referred to a United States Attorney for recovery by appropriate action in United States District Court.

4. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim.

B. Within thirty days of the effective date of this Order, the Respondent shall submit to EPA;

(a) a proposed plugging and abandonment plan for each of the six wells listed in Attachment A to the Proposed Administrative Order;

(b) proof of financial responsibility for costs of plugging and abandoning all wells listed in Attachment A to the Proposed Administrative Order, in a form satisfactory to the Director;

(c) proper documentation of ownership of Many Rocks Gallup field;

(d) annual operating reports for the previous two years (1996 and 1997);

(e) a schedule for conducting mechanical integrity tests on the six wells listed in Attachment A to the Proposed Administrative Order and shall conduct the tests within forty-five days of the effective date of this Order;

(f) an application for an area permit to operate the injection wells in the field.

C. Until EPA receives the required documentation listed above and issues a permit to operate the six wells listed in Attachment A to the Proposed Administrative Order, the Respondent is prohibited from injecting into the wells in accordance with 40 C.F.R. Section 144.22(c) and Section 1423(c) of the Safe Drinking Water Act.

D. Pursuant to 40 C.F.R. §22.27(c), this Order shall become effective forty-five (45) days after the initial decision is served upon the parties unless (1) A party appeals the initial

decision to the EPA Environmental Appeals Board,[10] (2) a party moves to set aside the default order that constitutes this initial decision, or (3) the Environmental Appeals Board elects to review the initial decision on its own initiative.

IT IS SO ORDERED.

Date: 4/3/00

/s/_____
Steven W. Anderson
Region Judicial Officer

[10]Under 40 C.F.R. § 22.30, any party may appeal this Order by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board within **thirty days** after this Initial Decision is served upon the parties.